

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA L. MARCELLUS

Claimant

VS.

ENTRA CARE

Respondent

AND

STANDARD FIRE INSURANCE CO.

Insurance Carrier

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Docket No. 1,054,642

ORDER

Claimant requests review of the March 15, 2012, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment finding that the treatment that is being recommended for claimant is not for the effects of the October 25, 2010, work incident. The ALJ also found that respondent should reimburse claimant \$40 for a February 11, 2011, chiropractic visit as an authorized medical expense.

The claimant requests review of whether her need for additional medical treatment is due to injuries that arose out of and in the course of her employment. Claimant argues that benefits should be awarded because her injuries were either sustained in the fall at work, or in an intervening car accident on her way from treatment for the injuries sustained from the fall at work.

Respondent argues that the ALJ's Order should be affirmed as claimant has failed to meet her burden of proof that the workplace injury of October 25, 2010, caused her need for additional treatment. Additionally, respondent argues that the car accident occurred as claimant was returning from physical therapy ordered by the orthopedic surgeon who performed the hip replacement surgery. He was never authorized to treat claimant for the effects of the fall.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant has worked for respondent for 17 years. On October 25, 2010, claimant was injured when her right leg slid on some silicone as she was walking across the floor, which in turn caused her left leg to come towards her as she was leaning back to keep from falling. But claimant couldn't hold on and she fell, with her buttocks and low back hitting the linoleum covered concrete floor. Claimant felt immediate pain in her left groin.¹ She was, however, able to continue working.

The next day, claimant noticed a bruise on her left leg along her thigh and tailbone. Claimant stated that she felt like she had been hit by a truck. Claimant was sent to Occupational Health Services (OHS) and saw Dr. William Tiemann, who gave her some cold packs and Aleve and x-rays were taken. Claimant was diagnosed with a strain of the left hip and a mild strain of the lumbar spine.

Claimant also met with Dr. Mark J. Maguire, the physician who performed her total left hip replacement in April 2010 to make sure that the hardware from the hip surgery was still in place.² Claimant also described this examination by Dr. Maguire as a "regular meeting".³ Initially, Dr. Maguire injected her trochanteric area. When he next examined claimant on December 29, 2010, she displayed only anterior pain with little tenderness at the trochanteric area. She had no buttock or back pain, no pain with normal walking, no night pain and only a little weakness and pain when she flexed her hip. She was walking well. Dr. Maguire determined that some physical therapy would be appropriate.

Claimant was sent back to the clinic at the end of January 2011 with complaints of pain in her low back that wrapped around the buttocks and hip pain. Claimant was examined by Dr. Tiemann on January 27, 2011. At that time she walked without a limp and her lumbar examination was unremarkable. There was no tenderness at the greater trochanter and claimant had a full active and passive range of motion. She was returned to full duty without restrictions and no permanency was expected.

On February 3, 2011, claimant met with chiropractor, Dr. Jeff Barger. Dr. Barger took claimant off work for a few days and imposed a 10 pound lifting restriction. Dr. Barger noted claimant was experiencing bilateral low back pain over the sacrum with pain running into the small of her back and extending into the thoracic area and around the ribs.

¹ P.H. Trans. at 5-6.

² P.H. Trans. at 7-8.

³ P.H. Trans. at 9.

Claimant testified that respondent knew that she was referred to Dr. Barger. However, there is no indication that Dr. Barger was ever authorized.

Claimant testified that her condition in January 2011 was different from what it was in April 2010 because of the low back pain that wrapped around the buttocks. She also reported excruciating pain in her hip.

On February 9, 2011, as claimant was going home from physical therapy, she was involved in a car accident. This therapy visit was ordered by Dr. Maguire for her left hip problems that resurfaced after her October 2010 fall.⁴ Claimant testified that the car accident made her back worse. Claimant returned to Dr. Barger on February 11, 2011, with complaints of bilateral low back pain across the sacrum, neck pain, upper thoracic pain, but with no neurological symptoms.

On February 11, 2011, claimant returned to Dr. Maguire for an examination. Claimant reported that her hip was “perfectly fine”⁵ until the automobile accident on February 9, 2011. Claimant stated that she got bounced around quite a bit. X-rays indicated her hip remained well aligned and solidly fixed with no signs of loosening or fracture.

In April 2011, claimant went to Dr. Sabrina Markese, her family physician and received some muscle relaxers and pain medication. In a hand written note on April 1, 2011, Dr. Markese noted that the type of injury noted on an x-ray from February 14, 2011, was likely the result of a fall type accident. Claimant testified at the preliminary hearing that after treatment for the car accident, claimant’s condition went back to what it was before.

Claimant was sent by respondent to Dr. James Zarr on May 17, 2011. Claimant displayed complaints of low back pain and bilateral hip pain. X-rays indicated a total hip replacement on the left side. Range of motion testing in claimant’s lower extremities was normal with no redness, warmth or swelling of any major joints. Internal and external rotation of the hips was pain-free. Muscle testing was normal in both lower extremities and there was no gross atrophy. Claimant displayed tenderness to palpation in the lumbosacral paraspinal muscles but not over the gluteal regions, hips or greater trochanter bilaterally. Dr. Zarr’s impression was low back pain radiating around both hips. He recommended physical therapy, home stretching and pain management. Dr. Zarr’s recommended physical therapy did not improve claimant’s condition.

Claimant was next examined by Dr. Zarr on June 20, 2011. Claimant’s condition had not improved and she displayed tenderness over the same involved areas. Claimant was referred to a pain management clinic for injections over a three week period. Once the injection series was completed, then claimant would be at maximum medical improvement.

⁴ P.H. Trans. at 14.

⁵ P.H. Trans., Cl. Ex. 1 at 6 (Dr. Maguire’s Feb. 11, 2011 note).

But, claimant did not have the injections. By letter on June 6, 2011, Dr. Zarr opined that claimant's work-related injury of October 25, 2010, "is insignificant in causation of her low back and bilateral hip pain".⁶ The work related injury of October 25, 2010, did not cause her current low back and bilateral hip pain complaints.

Claimant admits to having a low back and tailbone injury in 2005 and since then she has had ongoing problems in those areas.⁷ At that time claimant participated in a work hardening program which she testified helped her tremendously. Claimant acknowledged that she lost 25 pounds through the exercise part of that program, but also started having a lot of groin pain and pain in her left leg, which was later associated with the hip problems which led to the hip replacement.⁸

Currently, claimant experiences pain in her lower back and below the belt around the buttocks when she performs heavy and repetitive lifting.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹⁰

Claimant suffered a work related accident on October 25, 2010 as the result of a fall at work. She was treated by both Dr. Tiemann and Dr. Maguire. Dr. Tiemann found claimant to be recovered on January 27, 2011, and returned her to work with no restrictions or impairment. Claimant's examination by Dr. Maguire was a regular meeting as a follow-up to the hip replacement. When claimant saw Dr. Maguire on February 11, 2011, two days after the automobile accident, she reported that she was "perfectly fine" until the automobile accident. Then she got bounced around quite a bit. Claimant also testified that after treatment, for the car accident, her condition went back to what it was before the accident, which according to Dr. Maguire, was "perfectly fine".¹¹ Finally, Dr. Zarr opines that

⁶ P.H. Trans., Resp. Ex. A at 7.

⁷ P.H. Trans. at 18.

⁸ P.H. Trans. at 19.

⁹ K.S.A. 44-501 and K.S.A. 44-508(g).

¹⁰ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹¹ P.H. Trans., Cl. Ex. 1 at 6.

claimant's need for ongoing medical treatment in June, 2011, is not related to the fall at work. The ALJ found Dr. Zarr's opinion persuasive, and so does this Board Member. Claimant's complaints appear to contradict themselves. She is either having problems as the result of the fall, or she recovered and was nearly symptom free before the car accident. Also, claimant described herself as being "perfectly fine" before the automobile accident. Then she stated that, after treatment, she had returned to the same level as before the automobile accident. The extent of claimant's ongoing problems and her request for ongoing medical treatment are defeated by her own contradictions. Claimant has failed to prove that her current need for medical treatment is the result of the work-related accident while working for respondent. The denial of benefits in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove, by a preponderance of the credible evidence that her current need for medical treatment is the result of the work-related accident on October 25, 2010. The Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated March 15, 2012, is affirmed.

¹² K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge